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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

This case raises the stark question whether a defendant can be forced to trial on new federal criminal charges with only two days' notice.

The Solicitor General argues, as did the United States Attorney below, that Petitioner was not entitled to relief even though a superseding indictment which added a number of new counts and dramatically expanded the time frame of the alleged charges was returned two days before his trial began. The Solicitor General argues, as did the United States Attorney below, that Petitioner failed to establish any prejudice as a result of the denial of any continuance.

In essence, the Solicitor General, the United States Attorney, the Court of Appeals, and the United States District Court for the Southern District of New York have all taken

the position that a defendant cannot complain that he was tried without an opportunity to prepare a defense unless he also shows -- at the very time he is asking for time to prepare a defense -- what his defense will be and/or demonstrates to the appeals court what specific prejudice he suffered because he was not given time to prepare.

The absurdity and the unfairness of this position cannot go unchallenged.

To require appellate counsel to articulate what Petitioner's defenses might have been (when the defenses are not reflected in the record because trial counsel did not have an opportunity to ascertain the defenses) is truly bizarre. Even if appellate counsel could describe such defenses, it would raise matters which are, by definition, outside the record and thus could not properly be put before the appeals court or this Court. Even

Petitioner's trial counsel may well not have known what Petitioner's defense or defenses could have been. His complaint to the trial court was that he needed time to ascertain just this, to explore the relevant facts with his client, to make whatever investigation into the facts was appropriate, and then to consider the range of legal defenses which might be available. It would have been the height of frivolity for trial counsel to have spent his valuable preparatory time before the superseding indictment was returned preparing a defense to charges which might be brought in a superseding indictment instead of preparing for what was in fact in the indictment which had been returned.

All along, Petitioner has confronted a classic Catch-22 situation and now the government asks this Court to approve it. Petitioner has been required to show how his

defense was prejudiced where the crux of his complaint is precisely that he was deprived of a meaningful opportunity to prepare a defense.

This Court should therefore grant certiorari to consider whether, in the federal courts, a defendant must always be given an opportunity to prepare a defense to a superseding indictment which makes substantial substantive changes in the charges against him and, if not, what showing he must make to establish his entitlement to defense preparation time.

CONCLUSION

For these reasons, and for the reasons set forth in the Petition, Petitioner respectfully asks that the writ of certiorari be granted.

Respectfully submitted,

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